and the affirmative defense. However, in this case, there was no "gateway" claim alleging violation of the Plant Closing Agreement. The core holding of *Textron* is that, absent such a claim, the District Court did not have jurisdiction to invalidate the Plant Closing Agreement and proceed to hear the Petitioners' claims under the superceded CBA.

II. THE SIXTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH THE SEVENTH CIRCUIT'S DECISION IN *INTERNATIONAL UNION OF OPR. ENGR. V. RABINE*

Nor does the Seventh Circuit's decision in *International Union of Operating Engineers v. Rabine*, 161 F.3d 427 (7th Cir. 1998) cast doubt on the soundness of the Sixth Circuit's decision in this case. In *Rabine*, the Seventh Circuit held that the issue of whether a defendant facing suit in a Section 301 action meets the statutory definition of "employer" is a question concerning the merits of the suit, not jurisdiction. *Rabine*, 161 F.3d at 430.

There are two crucial distinctions between *Rabine* and this action. First, the labor union in *Rabine* was not seeking to invalidate a Section 301 agreement, and therefore did not confront the holding from *Textron* that federal courts lack jurisdiction to hear such claims.

Second, this Court has never suggested that the statutory definition of an "employer" has jurisdictional implications in a Section 301 action. By contrast, in *Textron* itself, this Court confirmed that the core jurisdictional requirement for a Section 301 action is "a suit[] for violation" of a collective bargaining agreement. *Textron*, 523 U.S. at 656.

III. THE SIXTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH THIS COURT'S DECISION IN *STEEL CO. V. CITIZENS FOR A BETTER ENVIRONMENT*

This Court's decision in *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83 (1998) is no more helpful to the Petitioners' argument than *Textron* or *Rabine*, both *supra*. In *Steel Co.* this Court reaffirmed prior decisions holding that "jurisdiction . . . is not defeated by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover." *Steel Co.* , 523 U.S. at 89, *quoting Bell v. Hood*, 327 U.S. 678, 682 (1946). Even if "one construction" of the laws underlying a petitioner's claims will result in the defeat of the claims, a district court clearly has jurisdiction if, under another construction, the petitioner's right to recover will be sustained. *Id.* "[T]he failure of a cause of action does not automatically produce a failure of jurisdiction . . ." *Steel Co.*, 523 U.S. at 91. Nothing about these holdings is particularly remarkable.

But, in this case, the District Court and the Sixth Circuit did not find a lack of jurisdiction merely because, in their view, the Petitioners would not prevail on the merits of their claims. To the contrary, the lower courts relied on the core jurisdictional requirement for a Section 301 action – a "suit for violation" of a collective bargaining agreement, and found it lacking with regard to the Plant Closing Agreement. 29 U.S.C. § 185(a). Under this Court's ruling in *Textron*, the Petitioners' claim that the Plant Closing Agreement is void is insufficient to confer jurisdiction under Section 301 for the purpose of invalidating that agreement.

IV. EVEN ABSENT THE QUESTION OF JURISDICTION, THE PETITIONERS' CLAIMS FAIL ON THE MERITS

Even if the District Court had reached the merits of the Petitioners' duty of fair representation claims against the Union, and had not dismissed them on jurisdictional grounds, the inevitable result would still have been dismissal. The Petitioners' interpretation of their rights under the successors and assigns clause of the 1998 CBA is nothing more than wishful thinking. More important, even if the District Court had assumed that the Union's Secretary-Treasurer made inaccurate statements to employees about their right to pursue the Hamlet grievance, the Petitioners produced no evidence that those statements influenced even one employee's vote on ratification of the Plant Closing Agreement. Nor is there any evidence of bad faith, arbitrariness or discriminatory intent on the part of the Union – a required element of any claim for violation of the Union's duty of fair representation.

1. The Petitioners' Expansive Interpretation of the Successors and Assigns Clause Runs Contrary to the Express Language and Purpose of the Clause

Even if the Petitioners had succeeded in invalidating the Plant Closing Agreement, they still bore the burden of establishing that Baskin-Robbins violated the successors and assigns clause in the 1998 CBA when, upon closure of the plant, it failed to pay employees the liquidated damages provided by the clause. Only if a contract violation is established can the Petitioners argue that the Union's settlement of the Hamlet grievance constituted a breach of its duty of fair representation. *Hines v. Anchor Freight*, 424 U.S. 554, 570-71 (1976); *Wood v. International Brotherhood*

of Teamsters, etc., Local 406, 807 F.2d 493, 502 (6th Cir. 1986).

The Petitioners' expansive interpretation of the successors and assigns clause must ultimately fail because it is not supported by the express language and purpose of the clause or by any reasonable scenario flowing from the Petitioners' interpretation.

The purpose of the successors and assigns clause was to protect employees should a new employer take over all or part of the Owensboro operation, i.e. the physical plant. The Union brought this issue up with Baskin-Robbins because of rumors that the Owensboro Plant might be sold to another employer who would refuse to pay the wages and benefits under the contract. The language of the clause thus contemplates a sale, lease or other transfer of the Owensboro "operation," in whole or in part, to another employer. [R.45, Union Exhibit 7 (successors and assigns clause), Apx pg 118.] Under such circumstances, the liquidated damages provision would have given Baskin-Robbins a strong incentive to condition the transfer on acceptance by the new employer of the collective bargaining agreement with the Union and continued operation of the Owensboro plant subject to that agreement. The clause addressed employees' concerns and achieved the Union's purpose.

But Baskin-Robbins did not transfer the Owensboro operation to another employer, in whole or in part. Instead, it subcontracted ice cream production to a Dean Foods plant in Chicago and closed the Owensboro plant. The Petitioners have focused on the term "operation" in the successors and assigns clause and have argued that Baskin-Robbins did in fact transfer the "operation of producing ice cream" to another employer. Unfortunately, viewed in the context of the

successors and assigns clause, it is clear that the term "operation" was intended to have its ordinary and commonly-understood meaning – the physical operation of the Owensboro plant.

When Baskin-Robbins gave its notice of the plant's closing, the Union consulted its attorneys and determined that the prospects for winning an arbitration based on the successors and assigns clause were slim. The Union's position was further weakened by the absence of a clause in the contact that prohibited subcontracting and by the fact that an employer has the undisputed right to close a plant during the life of a labor contract.

Despite the weaknesses in its position, the Union proceeded with a grievance under the successors and assigns clause – the Hamlet grievance. But the Union but did not want to put employees in the position of relying solely on an arbitration that appeared unlikely to produce the desired results. So that employees would have an alternative, the Union entered into negotiations with Baskin-Robbins over the effects of the plant closing, arguing as the Petitioners do here, that the Hamlet grievance was meritorious, that the successors and assigns clause was broad in scope and that Baskin-Robbins was liable to employees. In the end, the Union was able to obtain a $1.2 million severance package for employees and an "exception letter" confirming that, if the Owensboro plant resumed ice cream production at any time during the next year, employees would be entitled to the benefits and protections of the collective bargaining agreement.

But the Union's arguments to Baskin-Robbins and its success in negotiations do not alter the fact that its original assessment of the Hamlet grievance was accurate. The background, purpose and language of the successors and

assigns clause are clear – it was intended to apply only to a transfer of the physical operation of the Owensboro Plant, in whole or part, to another employer.[5] The Petitioners have thus failed to establish a violation of the collective bargaining agreement and their claims that the Union violated its duty of fair representation would inevitably have been dismissed on the merits had they not been dismissed on jurisdictional grounds.

2. Assuming That the Union's Secretary-Treasurer Made the Statements Attributed to Him by Some of the Petitioners, the Petitioners Have Produced No Evidence That the Statements Influenced Even One Vote

In order to prevail on their duty of fair representation claim, the Petitioners must also establish a "causal link" or "direct nexus" between the Union's alleged breach and the harm they suffered. *Deboles v. TransWorld Airlines, Inc.*, 552 F.2d 1005, 1018-1019 (3d Cir.), *cert. denied*, 434 U.S. 837 (1977) (requiring a "direct nexus" or "proximate

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[5]Indeed, it is difficult to imagine a scenario in which Baskin-Robbins could have subcontracted the production of ice cream to a Chicago facility some 400 miles away while insisting that the subcontractor assume the contract with Local 783. Would the Owensboro employees have moved to Chicago? Would Local 783, whose jurisdiction is limited to Kentucky, have continued to represent employees after the move to Chicago? These questions highlight the fact that, in this situation, meaningful protection for the Owensboro employees could only have been a provided by a clause prohibiting subcontracting. Given Baskin-Robbins' "outsourcing" plans, it is unlikely that it would ever have agreed to a provision restricting its right to subcontract.

cause");[6] *Self v. Drivers, Chauffeurs, Warehousemen & Helpers Local Union No. 61*, 620 F.2d 439, 443-44 (4th Cir. 1980); *Wood v. International Brotherhood of Teamsters, etc., Local 406*, 807 F.2d 493, 502 (6th Cir. 1986) (requiring "but for" causation); *Williams v. Romano Bros. Beverage Co.*, 939 F.2d 505, 508 (7th Cir. 1991); *Anderson v. United Paperworkers Int'l Union*, 641 F.2d 574, 578-579 (8th Cir. 1981) (requiring a "causal link"); *Acri v. Int'l Ass'n of Machinists*, 781 F.2d 1393, 1397 (9th Cir. 1986).

The Petitioners have alleged (a) that, at a meeting held on February 25, 2001, the Union's Secretary-Treasurer (Jerry Vincent), made statements to the effect that ratification of the Plant Closing Agreement would not affect the Union's pursuit of the Hamlet grievance; and (b) that the Secretary-Treasurer's statements resulted in the 59-17 vote in favor of ratification, the Union's acceptance of the $1.2 million severance package, and waiver of the Petitioners' rights under the Hamlet grievance and the successors and assigns clause in the contract.

But, despite these allegations, the Petitioners failed to produce any evidence that the Secretary-Treasurer's alleged statements had any impact on the outcome of the ratification vote. The alleged statements certainly had no effect on the twelve Petitioners who voted against ratification. And, of the ten Petitioners who voted in favor of ratification, only two claimed to have heard Vincent say that the grievance would

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[6] Citing *Hines v. Anchor Motor Freight*, 424 U.S. 554, 567-568 (1976) (union's breach of duty must be found to have "contributed to the erroneous outcome of the contractual proceedings"); *Humphrey v. Moore*, 375 U.S. 335, 350-351 (1964) (employees must demonstrate "that the result would have been different had the matter been differently presented.")

go forward even if the agreement was ratified (Charles Ijames and Chuck Mitchell). Even these two Petitioners testified that the Secretary-Treasurer's statements were not why they voted "yes." Both testified that they understood from the mailings they had received that employees could receive the severance package, as provided by the plant closing agreement, or pursue the grievance, but not both. [R.57, Ijames Depo. 31, Apx pg 498; R.56, Mitchell Depo. 25-29, Apx pgs 477-481.]

The Petitioners have argued that, even if the Secretary-Treasurer's statements had no impact on their individual votes, the alleged misrepresentations nevertheless influenced the votes of others who voted in favor of the plant closing agreement. The Petitioners have cited the testimony of Robert Sikes (a no vote), who testified only that some of the employees at the meeting were mad. [R.70, Sikes Depo. 25, Apx pg 697.] The Petitioners have also cited the testimony of Mike Evans. Evans purportedly heard the Secretary-Treasurer say that, if employees voted for the severance package, the Union would still go ahead with the grievance. [R.66, Evans Depo. 62-63, Apx pgs 624-625.] Although Evans himself voted no, he believed that Vincent's statements persuaded others to vote yes. At his deposition, Evans was asked the following:

Q: Do you believe that the severance package would have passed if [Union Secretary-Treasurer] Jerry Vincent had not made that statement?

Evans: No

Q: Why do you believe that?

Evans: You know, there's been so much anger there, I guess. I don't know. You know, it's just - - there already was.

[R.66, Evans Depo, p. 63, Apx pg 625.] On further questioning, Evans had the following exchange with Baskin-Robbins' counsel:

Q: Have you talked to other members about how they voted?

Evans: I just got a few friends there and that's it. I mean, I don't know what anybody else thinks. You know, I got a few friends that, you know, that worked there. You know, and I run into people every now and then. But, you know, I don't ask people, you know, "How did you vote on that and what do you think about it?" You know.

Q: Well, sitting here, am I correct in understanding that you can't identify a person who would have changed their vote had Mr. Vincent not made that statement?

Evans: I only know how a few people voted. You understand what I'm saying?

Q: Uh-huh. - I understand.

Evans: A few votes. You know, one, two, three votes ain't going to matter from the votes that it was. You know what I'm saying. I'm just going by the feeling of the people that it probably would have changed it.

The feeling of the way people were. I mean if you ever had experienced it, you know, you'd know. I mean, if you'd ever experienced it, then you do know.

Q: Well, I understand what you're saying in terms of feeling, but what I'm looking for is just some very specific evidence. Okay? Do you know of anybody who voted yes who would have changed their vote if Mr. Vincent had not made his statement?

Evans: Do I know anybody that would have changed their vote?

Q: Yes, Uh-huh.

Evans: I mean how am I supposed to know that? You know what I'm saying?

Q: I'm not saying you're supposed to. I would be a little surprised if you did, but I want to make sure that you don't – you can't sit here and tell me the name of somebody who would have changed their vote?

Evans: I mean, no. I can't you know.

Q: Okay.

A Nobody has come up to me and said, you know, if he said no, I would have – –

Q: Would have voted differently?

Evans: I just know my feelings on that.

[R.66, Evans Depo. 63-66, Apx pgs 625-628.] This exchange is the sum total of the Petitioners' evidence that the Secretary-Treasurer's purported misrepresentations about the Union's intent to pursue the Hamlet grievance changed the outcome of the 59-17 vote on the severance package. The Petitioners thus failed to identify a single employee who voted in favor of ratification because of the alleged misrepresentations from the Union's Secretary-Treasurer.[7] There is no direct nexus or causal link between the Union's alleged breach of its obligations and the harm claimed by the Petitioners. The Petitioners' duty of fair representation claim once again fails on the merits.

3. There is No Evidence of Bad Faith, Arbitrariness or Discriminatory Intent on the Part of the Union

Even if the Petitioners had established that Baskin-Robbins violated the successors and assigns clause of the 1998 CBA, and even if they had further established that, but for inaccurate statements made by the Union's Secretary-Treasurer, the Plant Closing Agreement would not have been ratified by employees, they still failed to satisfy another

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[7] Even with proof that some employees changed their votes based on the alleged statements, the Petitioners must still show that the reliance that individual members placed on the Secretary-Treasurer's oral statements was reasonable. *Anderson v. United Paperworkers Int'l Union*, 641 F.2d 574 (8th Cir. 1981); *Archer v. Airline Pilots Ass'n Int'l*, 609 F.2d 934, 939 (9th Cir. 1979). In light of the Union notice posted in the plant and the mailings received by employees from both Baskin-Robbins and the Union, such reliance would have been manifestly unreasonable.

mandatory element of their duty of fair representation claim against the Union. The Petitioners failed to produce any evidence of bad faith, arbitrariness or discriminatory intent on the part of the Union. *Airline Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65 (1991). "*O'Neill* mandates that a deferential standard of review be utilized in evaluating a union's actions." *Nida v. Plant Protection Ass'n Nat'l*, 7 F.3d 522, 526 (6th Cir. 1993.)

In the present case, the only evidence of bad faith cited by the Petitioners is the fact that another Teamsters local represented employees at the Dean Foods plant in Chicago. Even this small shred of evidence is fatally flawed. As noted above, the Union representing the Owensboro employees was Teamsters Local 783, headquartered in Louisville. Contrary to the Petitioners' accusations, Local 783 had no incentive to sell out its members for the benefit of another union – even another Teamsters local. Local 783 had nothing to gain and everything to lose from closure of the Owensboro Plant and severance of its employees.

Nor have Petitioners produced any other evidence of bad faith, arbitrariness, or discriminatory intent on the part of the Union. There is no evidence that the Union harbored any animosity towards employees. There is no evidence that the Union had anything but an adversarial relationship with Baskin-Robbins. There is no evidence that the Union had any prior notice of Baskin-Robbins' intent to "outsource" the making of ice cream and close the Owensboro plant. And there is no evidence that the Union did anything other than obtain the best possible severance package for employees – one that was worth $1.2 million. And, even if this Court disagrees with the Union's assessment of the merits of the Hamlet grievance, there is no evidence that the Union intentionally failed to pursue a meritorious grievance or

intentionally misled members. Where the evidence indicates that, after lengthy negotiations with an employer, "the Union thought it had reached the best solution possible," a finding of bad faith is not warranted. *Adcox*, 21 F.3d at 1388, citing *O'Neill, supra*.

The alleged misstatements by the Union's Secretary-Treasurer do not alter this analysis. Assuming that the Secretary-Treasurer in fact told members that acceptance of the severance package would not effect the grievance, the Petitioners have produced no evidence that this was anything other than a mistake on his part. The Secretary-Treasurer and the Union showed by their actions - and the size of the severance package they obtained - that they took their responsibilities seriously and had the interests of employees at heart.

CONCLUSION

For the forgoing reasons, Respondent International Brotherhood of Teamsters, Local Union 783, respectfully requests that the petition for certiorari be denied. The decisions of the lower courts on the question of jurisdiction case do not conflict with any precedent from this Court and do not conflict with any precedent from another circuit. Moreover, even if the District Court had accepted jurisdiction over the Petitioners' claims against the Union, those claims would inevitably have been dismissed on the merits. The Petitioners failed to present evidence sufficient to create a genuine issue of material fact supporting their claims that the Union violated its duty of fair representation.

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In The
Supreme Court of the United States

JIM BURKLOW, ET AL.,

Petitioners,

v.

BASKIN-ROBBINS USA, CO., AND INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL UNION NO. 783,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF RESPONDENT BASKIN-ROBBINS USA, CO., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court below properly held that it lacked § 301 subject matter jurisdiction over a claim seeking to enforce a superseded labor agreement because the court would first be required to invalidate the existing labor agreement.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Baskin-Robbins USA, Co., makes the following disclosure statement regarding corporate ownership:

Baskin-Robbins USA, Co., a California corporation, operates a franchise system under the trade-names "Baskin 31 Robbins Ice Cream," and "Baskin 31 Robbins Ice Cream and Yogurt." Baskin-Robbins USA, Co., is a wholly-owned, indirect subsidiary of Dunkin' Brands, Inc., which is in turn a wholly-owned, indirect subsidiary of Pernod Ricard S.A. Pernod Ricard S.A. is listed on the Premier Marche of Euronext Paris S.A. and has issued an American Depository Receipt program in the United States sponsored by the Bank of New York. No other corporation owns 10% or more of Respondent Baskin-Robbins USA, Co.'s, stock.

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BRIEF OF RESPONDENT BASKIN-ROBBINS USA, CO., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTERSTATEMENT OF THE CASE

This case arose out of the closing of the Baskin-Robbins ice cream manufacturing Plant in Owensboro on March 15, 2001 ("Plant"). P.A. 6a, Memorandum Opinion and Orders, 6a-7a.[1] The basic facts are largely undisputed. Respondent Baskin-Robbins USA, Co. ("Baskin") was the employer at the Plant. Respondent Teamsters Local 783 ("Union" or "Local 783") was the labor union that represented the hourly-paid employees at the Plant. P.A. 6a, Memorandum Opinion and Orders, 7a. Petitioners Burklow, et al. ("Burklow Employees") are a minority of the former unionized employees at the Plant. P.A. 6a, Memorandum Opinion and Orders, 7a. Baskin and Local 783 were parties to a collective bargaining agreement effective 1998-2002 ("Labor Contract") that contained a clause requiring that in certain circumstances Baskin either apply the agreement to a successor employer or pay certain severance benefits. P.A. 6a, Memorandum Opinion and Orders, 7a. Subsequently, Baskin and Local 783 negotiated a plant closing agreement ("Closing Agreement") that, on its face, is valid and binding and supersedes the prior Labor Contract.

On January 12, 2001, Baskin announced to its employees that the Plant would be closed and advised them of its position that the successors and assigns clause in the Labor Contract did not apply to a plant closing. P.A. 6a,

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[1] Citations labeled "P.A." are to the appendix attached to the petition for writ of certiorari.

Memorandum Opinion and Orders, 7a. Several days later, chief steward Mike Hamlet filed a grievance objecting to Baskin's position, which was later rejected by Baskin. P.A. 6a, Memorandum Opinion and Orders, 7a.

Baskin and the Union then engaged in negotiations that produced a comprehensive agreement resolving the impact of the Plant closing on the employees and settling all claims. P.A. 6a, Memorandum Opinion and Orders, 7a. After the first day of negotiations, Local 783 official Thomason sent a memorandum to each employee at the Plant outlining what had transpired during the first day of bargaining. R. 44, Def. Exh. 4, Apx. pg. 64. This memorandum to the employees made it clear that Baskin and Local 783 were negotiating a comprehensive settlement.

By the end of the second day of negotiations, Baskin and the Union reached a consensus on a comprehensive Plant closing agreement, subject to employee ratification. P.A. 6a, Memorandum Opinion and Orders, 7a. On February 16, 2001, Baskin sent an explanation of the proposed Closing Agreement to all unionized employees, and urged them to vote in favor of the agreement. *See, e.g.*, R. 44, Def. Exh. 6, Apx. pgs. 80-85. Baskin's explanation stated that the employees had two options – either to accept the proposed Closing Agreement, or to reject it and arbitrate the application of the successors and assigns clause of the existing Labor Contract – and explained the consequences of voting for and against ratification. *Id.*

The Union submitted the proposed Closing Agreement to the membership for ratification. The proposed agreement expressly released all "grievances and claims relating to the plant closing and the [existing labor] contract." P.A. 6a, Memorandum Opinion and Orders, 9a. The

employees voted on the Closing Agreement on February 25, 2001. P.A. 6a, Memorandum Opinion and Orders, 8a. The vote was fifty-nine to seventeen (59-17) in favor of ratification. P.A. 6a, Memorandum Opinion and Orders, 8a. It is uncontested that the vote itself was validly conducted and that the ballot count was accurate. Baskin and the Union then executed the ratified agreement.[2] P.A. 6a, Memorandum Opinion and Orders, 8a-9a.

After the Plant closed, Baskin proceeded to pay out the $1.2 million in settlement proceeds called for by the Closing Agreement. P.A. 6a, Memorandum Opinion and Orders, 9a; R. 48, Deposition of Wayne Olson, Apx. pg. 369. The Burklow Employees waited until all the payments called for under the Closing Agreement had been paid out, and then sued Baskin for allegedly violating the superseded Labor Contract.[3] P.A. 6a, Memorandum Opinion and Orders, 9a. The Burklow Employees did not return the funds they received under the Closing Agreement. They also failed even to acknowledge the existence of the Closing Agreement in their complaint, drafting the complaint as if the undisputed facts surrounding the Closing Agreement never occurred.

Baskin pointed out the existence of a superseding agreement in response to the complaint. The Burklow

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[2] Technically, Baskin's proposed Closing Agreement was ratified and signed by the Union, and then the parties executed a separate Closing Agreement that simply reaffirmed the Union's acceptance of Baskin's proposal. The only difference between the proposal and the ultimate Closing Agreement is one exception, more favorable to the employees, that is unrelated to the petition for certiorari. *See* 6a, Memorandum Opinion and Orders, 9a.

[3] It is undisputed that Baskin complied with all the provisions of the Closing Agreement.

Employees then attacked the validity of the Closing Agreement on the sole basis that the ratification vote was tainted by an alleged misleading comment made by an official of the Union (Jerry Vincent). *See* R. 75, Plaintiff's Memorandum in Response to Defendants' Motions for Summary Judgment, Apx. pgs. 139-40. Some of the Burklow Employees claim that Vincent made a comment that they interpreted as indicating that, despite Baskin's express statements to the employees that the Closing Agreement represented a full and complete settlement of all matters arising at the Plant (including the Plant closing and pending grievance), the members could accept Baskin's proposal yet still proceed with an arbitration seeking additional severance pay under the successors and assigns clause in the Labor Contract. R. 75, Plaintiff's Memorandum in Response to Defendants' Motions for Summary Judgment, Apx. pgs. 139-40. They argued that they would not have voted for the Closing Agreement had they understood the actual facts.

After extensive discovery, Baskin and Local 783 each moved for summary judgment on multiple independent grounds as to all claims by the Burklow Employees. Baskin presented several arguments why the claims failed, pointing out that (1) the Court lacked § 301 jurisdiction over the Burklow Employees' effort to invalidate the Closing Agreement; and (2) the state law claims were preempted by the primary jurisdiction of the NLRB. R. 42, Memorandum in Support of Defendant Baskin-Robbins USA, Co.'s Motion for Summary Judgment, at 16-21. Baskin also pointed out that the Burklow Employees could not raise a genuine issue for trial that the Closing Agreement was invalid, because (1) no reasonable jury could find that the hourly employees were unaware that voting

to accept the Closing Agreement meant a full settlement of all claims under the 1998-2002 Labor Contract; (2) there is no evidence that the alleged statement by Union official Vincent affected enough votes to change the outcome of the 59-17 vote in favor of the ratification; and (3) there is no evidence suggesting that Baskin was part of a conspiracy regarding (or was even aware of) Vincent's alleged statement, so Baskin is entitled to rely on the ratification vote. R. 42, Memorandum in Support of Defendant Baskin-Robbins USA, Co.'s Motion for Summary Judgment, at 22-31.

The United States District Court for the Western District of Kentucky granted summary judgment to both Baskin and Local 783. P.A. 6a, Memorandum Opinion and Orders, 21a-22a. As to the federal claims against Baskin, the District Court found that under two Sixth Circuit cases, *Adcox* and *Heussner*, it lacked jurisdiction to invalidate the Closing Agreement. *See Adcox v. Teledyne, Inc.*, 21 F.3d 1381 (6th Cir. 1994), *cert. denied*, 513 U.S. 871 (1994); *see also Heussner v. National Gypsum Co.*, 887 F.2d 672 (6th Cir. 1989).[4] The Burklow Employees had argued that the U.S. Supreme Court's decision in *Textron Lycoming Reciprocating Engine Div. v. UAW*, 523 U.S. 653 (1998), "implicitly overruled" *Adcox* and *Heussner*. R. 75, Plaintiff's Memorandum in Response to Defendants' Motions for Summary Judgment, at 144-45. The District Court expressly rejected this claim. P.A. 6a, Memorandum Opinion and Orders, 22a, n.1.

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[4] The state law claims against Baskin were dismissed by the District Court for reasons unrelated to the petition for certiorari and are now finally resolved in favor of Baskin.

The Burklow Employees appealed to the United States Court of Appeals for the Sixth Circuit, primarily arguing, again, that *Textron* overruled *Adcox* and *Heussner* and held that district courts may determine the validity of collective bargaining agreements as long as the suit is otherwise for violation of a contract. In a short, unpublished decision, the Sixth Circuit rejected the arguments raised by the Petitioners, citing *Bauer v. RBX Indus., Inc.*, 368 F.3d 569 (6th Cir. 2004).[6] In *Bauer*, a case decided after *Textron*, the Sixth Circuit reaffirmed its prior holdings that "a federal court does not have jurisdiction to hear a § 301 claim premised upon an expired or superseded contract . . . " *Id.* at 579, n.5. The Sixth Circuit held that *Bauer* was controlling, and affirmed the judgment of the District Court.

REASONS FOR DENYING THE PETITION

I. The Sixth Circuit's Decision Below Does Not Conflict with This Court's Ruling in *Textron Lycoming Reciprocating Engine Division v. UAW*.

Petitioners claim that the Sixth Circuit's decision directly conflicts with this Court's decision in *Textron*. Petitioners primarily rely on a strained interpretation of a hypothetical in the *Textron* decision. In this hypothetical, the Court notes that a district court would have jurisdiction to determine the validity of a contract where the validity of that same contract is challenged by the defendant. This,

[6] *Bauer* was decided after briefing but prior to oral argument before the Sixth Circuit.

Petitioners claim, is "precisely on point with what occurred in this case" [Cert. Petition, p. 13]. A review of the language from Textron refutes this argument:

> Thus if, in the course of deciding whether a plaintiff is entitled to relief for the defendant's alleged violation of a contract, the defendant interposes the affirmative defense that the contract was invalid, the court may, consistent with § 301(a), adjudicate that defense.

Textron, 523 U.S. at 658. All this language says is that a party accused of violating a contract can defend itself by arguing that the sued-upon contract is invalid.

The case before the Court here is not a dispute over a single contract, where Petitioners have sued for a violation of the agreement and Baskin has raised an affirmative defense that the agreement was invalid. This is a case involving two contracts, where Petitioners are attempting to resurrect a superseded agreement, and therefore must first invalidate the superseding contract. The *Textron* hypothetical relied on by Petitioners involves completely different circumstances than the case below, and thus there is no conflict between the Sixth Circuit's rulings in *Burklow* and *Bauer* and this Court's ruling in *Textron*.

Indeed, the actual holding in *Textron* strongly supports the Sixth Circuit's decision here. The Court in Textron held that courts do not have jurisdiction to hear a plaintiff's claim to invalidate a labor contract. *See Textron*, 523 U.S. at 653. Nothing in the dicta of *Textron* suggests that *Burklow, Bauer, Adcox*, or *Heussner* was decided improperly. The dicta indicate only that, once a federal court has § 301 subject matter jurisdiction over a claim for violation of a labor agreement, that court can hear a